

So, to repeat and conclude, the candidate is well qualified, exceptionally well qualified. That the candidate is a woman truly is incidental. When she is confirmed, President Clinton and the Senate will have taken a large step in demonstrating that gender should be and is irrelevant. The eminently well-qualified Justice O'Connor was the first woman on the Court. There had to be a first. There always has to be a first. But now, hopefully, we may be over "firsts," and into quality without regard to gender. To me it is a major event for the bar and the country. And I think we ought to pause for just one moment and acknowledge it.

Thank you.

[The prepared statement of Mr. Millstein follows:]

#### PREPARED STATEMENT OF IRA M. MILLSTEIN

I've known Ruth and Martin Ginsburg since the summer of 1957 when Martin joined our firm as a summer associate. We were then about 20 lawyers—all male—in smallish quarters on 42nd Street in New York City; we are now 650-plus lawyers in about nine geographic locations, at last count. I've been their friend throughout, even though we lost Marty as our partner in 1980 when Ruth became a Judge on the District of Columbia Circuit Court—a moment I recall with some bitter-sweetness. Sweetness at Ruth's appointment, her confirmation, and at being able to assist Ruth in that process; disappointment at losing from my firm the best tax lawyer in the United States, when they moved to Washington, away from our home base in New York City.

You've heard, and this morning no doubt will continue to hear, from Supreme Court scholars and practitioners about Ruth's talents and potential for being one of the great, not just good, Supreme Court Justices; surely you don't need still another exegesis on that subject. What may not have been emphasized enough is what I (and others such as Stanford Law School's outstanding Constitutional Scholar—Professor Gerald Gunther who is here today) perceive to be her greatest qualification—her non-ideological scholarship. She will be a Justice who applies the law carefully, analytically and with integrity in a clear and lean manner. She will not, however, operate in a vacuum, but, because she is who she is and has been, she will be ever mindful of the world she lives in and the men and women who inhabit it.

One recent decision, *Roosevelt v. DuPont*, 958 F.2d 416 (D.C. Cir. 1992), exemplifies my view of her judicial approach about as well as any decision of her's that I've read. It's meaningful to me because it deals with my practice area—business-related issues.

There, Judge Ginsburg flexibly entertained an issue first raised on appeal—because the Supreme Court had earlier suggested that appellate courts not by-pass, on technicalities, "issues of importance to the administration of federal law." She concluded that in "exceptional circumstances" Courts of Appeal "are not rigidly limited" solely to issues raised below. Moving to the merits of an important proxy issue, her reasoning followed a model process of clarity and precision. Dealing with a federal statute—she first looked to Congressional intent, and found a delegation of authority to the SEC, with very modest guidance from Congress as to how that delegated authority should be exercised. She next turned to the SEC action at issue to see if it coincided with Congress' intent. She obviously considered relevant judicial precedents, and importantly looked to expectations built upon a rather consistent interpretation of the law. Again, showing regard for not wasting litigator and judicial time with remands, she accepted a public statement of facts not strictly within the record below, but necessary to the outcome. Her decision was widely acclaimed—but, to me, the key was her flexibility, the scope of her inquiry and reasoning, and the concise nature of an opinion that said a great deal in a very short compass. You are dealing with a quiet person who possesses a legal mind of enormous scope, who recognizes the role of the Judiciary as one branch of government that, while working with co-equal branches, must be ever mindful of individual rights. And, by now, you must know that.

Her moderate views on the interstitial role of the Judiciary, and the need for collegiality on the Appellate Benches, are nowhere better stated than in her own "Madison Lecture" of March 9, 1993.

So, let's pass her obvious talents and non-ideological—rather ideal—approach to judicial decision-making. You have in Judge Ginsburg a Judge—and soon I hope a Justice—who practitioners would conclude will not only give them a fair shake, but

will do so with care and erudition. One can't ask for more from any Bench, or for any less from the Country's most important Bench.

But something even more important may be happening, and we shouldn't let the moment pass without comment. Having chosen as a candidate a lawyer/judge from a small pool of the very best quality available, I would like to think that President Clinton, and soon you and the Senate, have chosen, with gender-blindness, a person who happens to be a woman. If perhaps that is an overstatement this time, the day will soon come when it won't be.

Practicing now for almost 45 years I've watched the Bench and Bar become populated with women, but ever so slowly, and with a good deal of room for improvement. I serve with Cy Vance and others on a New York City Bar Association Committee on Diversity, which is a nice way of describing a Committee that is asking ourselves how we're doing with gender and race. The answer is: we're trying—but probably not hard enough—and there are ways we can improve.

Judge Ginsburg and my wife (also a professional woman) are among the reasons for my concern about diversity. Through both, and though the women who have become my partners at my firm, I've seen the indignities and unfairness which still exist; less than Ruth and my wife Diane grew up with—but far more than should still exist.

Marty, Ruth, Diane and I were friends when our children were small in the 60's and 70's. We saw each other and each other's children often. But then we all became busy on respective career paths in the 80's and 90's, and geography intervened. When we talk though—it's as if no time at all has passed.

In those early years, a person with Ruth's qualifications should have been fought over and sought by the law firms upon her graduation. It didn't happen. She should have had no trouble securing tenure on a Harvard, Yale or Columbia faculty. It didn't happen. I remember Marty's frustration and anger when Ruth was turned down for a professorship at a law school where we all thought we could help. I'm convinced that the only issue was gender on the faculty; and gender was still an issue in law partnerships around the country. It is no wonder that in the 70's Ruth Ginsburg turned her quality mind to gender issues under the United States Constitution and focused the profession's conscience on an issue the majority had been ignoring. The profession wasn't great in making room for women and racial minorities. I recall early on inviting a woman associate—our firm's first—to accompany me to a Bar Association lecture and reception—and being roundly ribbed and jabbed for doing so. I was embarrassed for us all. It's not so great—even now. I witnessed, just within the year, a small example. One of my women partners and I met a male who welcomed me warmly, and then invited us into his office—turning to my partner and saying, "C'mon honey, this way." I'm sure, it was said without thought or to denigrate, but nonetheless it was indicative of an attitude that hasn't died easily in our profession. My partner didn't flinch.

How does our profession overcome this? Only by training ourselves actively, and sensitizing ourselves to dealing with gender and race in a diverse workplace.

But actually making progress is even more important. And gender and racial diversity in our workplace becoming commonplace, is the single most important proof of progress in our profession. The workplaces for most of us are our partnerships, and the courtrooms. We lawyers normally behave ourselves in courtrooms, and sometimes take our good behavior with us out of the courtroom. When it becomes commonplace to appear before diverse judges, gender and racial distinctions will disappear further. The Bar's task is to make diversity acceptable and commonplace in our firms; the Executive and Legislative Branches should do likewise for the Judiciary. Happily, this is now becoming much easier for all of us. None of us can hide behind the old shibboleth that said: show me a dedicated and qualified woman and she'll make partner (or Judge, or Commissioner, or whatever). Of course, for years we defined "dedicated and qualified" to exclude 99 percent of those who applied. After a long struggle however, definitions have been clarified and there are now pools of highly qualified lawyers of diversity—so that choosing can be gender blind—and perhaps this day (and Ruth) should mark a beginning of gender blindness—for both the Bench and the Bar.

Senator Hatch deserves a very honorable mention in this process. When President Carter nominated Ruth to the D.C. Circuit towards the end of his four year term, it seemed as though the appointment would languish until after the election of November 1980. In that event, the likelihood of Ruth's confirmation, we now know, would have been slim to none. Opposition to Ruth was largely based on the assertion that she was a single issue lawyer—"women's rights".

I knew Senator Hatch from some prior dealings, the substance of which I now forget. But, of all the Republicans on this Committee, I thought I had the best relationship with him. I, personally, knew him to be open-minded. We didn't often agree

on substance—but I was always treated courteously and he heard me out. I called the Senator and asked for an audience for Ruth—urging him to just listen and make up his mind on the evidence—not gossip and rumor. He agreed. We three met somewhere for lunch and then talked for quite some time. The talk ranged over cabbages and kings and lawyers and judges, and I can't recall specifically.

When we were done, the Senator apparently concluded that Ruth Ginsburg was a legal scholar from no ideological school—who indeed had strong ideas on the law relating to gender issues. As she recently pointed out to this Committee, her gender work in the 70's was toward \* \* \* "the advancement of equal opportunity and responsibility for women and men in all fields of human endeavor." Ruth Ginsburg also demonstrated that she clearly had the makings of a judge before whom lawyers of all ideologies and persuasions would like to appear and have cases decided. The opposition melted away.

And Ruth was confirmed and on her way to today. Senator Hatch and I recently reminisced about that day, as two proud colleagues. Coming, as we do, from our respective political philosophies—that is true diversity in action.

So to repeat and conclude: This candidate is qualified—exceptionally qualified. That the candidate is a woman truly is incidental. When she is confirmed—President Clinton and the Senate will have taken a large step in demonstrating that gender should be, and is, irrelevant. The eminently well-qualified Justice O'Connor was the first woman on the Court—there had to be a first—there always has to be a first. But now, hopefully, we may be over "firsts" and into quality without any regard to gender. It's a major event for the Bar and the Country. Let's pause for one moment and acknowledge it.

The CHAIRMAN. Thank you very much. I thank you all. Your words were eloquent. They obviously speak for themselves. I have no questions.

Senator Hatch.

Senator HATCH. I just want to welcome all of you here and thank you all for appearing. I think you made very good statements that everybody should be listening to.

The CHAIRMAN. Senator Feinstein.

Senator FEINSTEIN. Just a small observation. As one who has usually in my prior life seen lawyers through the lens of an individual case, it is wonderful to see the breadth and the macro picture of the law. And I think it would lead every American to have a very great respect for the law. So I want to very sincerely thank you for coming, particularly Judge Hufstедler, whom I know. And I think we are going to see the glass ceiling shattered, and I must say I concur with your views 100 percent.

Thank you very much.

The CHAIRMAN. I thank you all.

Mr. COLEMAN. Mr. Chairman, since I am the only one that observed the 5 minutes, if I—[laughter].

The CHAIRMAN. No, Mr. Millstein observed the 5 minutes. Mr. Smith was close, and the judge, because she is a judge, is not bound by any rules. [Laughter.]

Judge HUFSTEDLER. Thank you.

Mr. COLEMAN. I just want to add my thanks to this committee that you would spend the three or four days airing this, although I am pretty sure after the first day everybody felt that in this case the nomination would be reported favorably. I think you have greatly educated the American people as to what the law is about, what this country is about, and how responsible politicians and judges try to meet the demands of the American people. And I thank you very much for taking the time and effort and providing the brains and brilliance in the way you conducted yourself.

The CHAIRMAN. Thank you very much, Mr. Secretary. Nice comment. I thank you all.

Senator HATCH. Thank you.

The CHAIRMAN. Our third panel is comprised of two very prominent members of the legal academic community. I might add that we could have had 150 members of the legal academic community who were willing and anxious to come and testify. But there was such unanimity that we responded to two in particular. The first is Prof. Gerald Gunther, the William Nelson Cromwell Professor of Law at Stanford Law School. Professor Gunther served as a law clerk for Chief Justice Earl Warren, and prior to his appointment at Stanford was a member of the faculty at Columbia University School of Law. Welcome, Professor. It is nice to have you back. And thank you, I might add parenthetically, for always being available to this committee for any information we ask and any input we have asked of you.

Next we have Herma Hill Kay, who is a dean of the University of California at Berkeley, Boalt Hall, School of Law. It is nice to see you again, Dean. Again, I thank you, every time I have asked for your input, you have provided it. She is a coauthor with the nominee of a casebook on sex-based discrimination and was among the first full-time women law professors in this country.

I welcome you both, and I will yield to you in the order you have been recognized.

**PANEL CONSISTING OF GERALD GUNTHER, WILLIAM NELSON CROMWELL PROFESSOR OF LAW, STANFORD UNIVERSITY, STANFORD, CA; AND HERMA HILL KAY, DEAN, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, CA**

#### **STATEMENT OF GERALD GUNTHER**

Mr. GUNTHER. Thank you, Mr. Chairman, members of the committee; that is, Senator Feinstein, my own Senator, a Stanford alumna, our last, most recent commencement speaker. I am really personally overjoyed and proud as well as professionally heartened that this committee is considering the nomination of Ruth Bader Ginsburg for a seat on the Supreme Court.

I speak as a teacher of constitutional law for more than 35 years, and as someone who has known Ruth Ginsburg well for almost as long a time. I am entirely confident that she possesses all of the qualities you should cherish in a Supreme Court Justice.

Ruth Ginsburg was my student at Columbia Law School. She was a brilliant student. She demonstrated extraordinary intellectual capacities, as she has in everything she has undertaken all her life. In the 1950's, I set up a program at Columbia to place our graduates as judicial law clerks, and I assisted her selection by a fine, originally recalcitrant, Federal judge.

I have followed her work closely in the years since. I admired her scholarly capacity as a faculty member at Rutgers and then at Columbia, and especially her historic work on behalf of women's rights, as a brief-writer and oral advocate before the Supreme Court.

In 1980, Ruth was named, as you know, to the Court of Appeals for the District of Columbia Circuit. I was asked then to speak at

her investiture ceremony and to speak about the task of judges. I had just begun work on a biography of one of our greatest Federal judges, Judge Learned Hand. In my address before the District of Columbia Circuit, I understandably spoke about Hand and compared Ruth Ginsburg's potential talents to his.

Although I do not claim a great track record in predicting anything—football, soccer, elections, you name it—I have taken special delight in the fact that my expectations about Ruth were entirely, and to me not surprisingly, fulfilled. I said then that I knew Ruth to be modest, thoughtful, penetrating, fair and open-minded, and I suggested that those qualities equipped her ideally for the bench.

I also said that she has the character and temperament, the persistence, the sense of responsibility, the modesty as well as the courage and strength reflected in Learned Hand's words and deeds. I read her opinions on the court of appeals for the last 13 years with great interest as they were handed down, and she disclosed precisely those qualities.

Ruth Ginsburg, I am convinced, possesses the ingredients, the moral qualities Hand thought essential for greatness. And I am confident she will confirm that greatness on the Supreme Court. She clearly possesses the requisite intellect, temperament, and character. Her opinions reflect an obvious belief in and fidelity to the law, careful attention to the records before her, and an appropriate respect for the force of precedent. She has demonstrated integrity and analytical skills. She is also characteristically sympathetic to the fact that the disputes before her involved human beings and that a court's rulings have an impact on those human beings. One would expect no less in a person who is herself a splendid human being, who has managed to integrate with great skill her roles as lawyer and teacher and judge as well as wife and mother, and who overcame the many obstacles that confronted her and other women who were entering the profession in the 1950's.

You have an opportunity to recommend the confirmation of an individual who will be a great Justice, a person who will contribute immensely to the collegiality, the intellectual quality, and the wisdom of the Supreme Court of the United States.

Now, I fully expect to criticize Justice Ginsburg's opinions on the Court. After all, that is my professional task. I am confident, however, I will never have reason to doubt her integrity, her judicial temperament, and her analytical abilities. I know that I, like most of my fellow academics, look forward to evaluating the work of a Supreme Court with Ruth Ginsburg on it.

I have tried to summarize my remarks. I have submitted a longer statement for the record.

The CHAIRMAN. Without objection, your entire written remarks will be placed in the record. It is hard to see how they could improve upon what you have said.

Mr. GUNTHER. Well, I did actually include a copy, as a matter of ultimate egomania, of the speech I delivered before the D.C. Circuit, because I well remember, Senator, the reaction at the reception afterwards when everyone I talked to winked at me when I tried to compare Ruth Ginsburg to the qualities of Learned Hand, and they said, "Nice job. But, of course, she is not going to turn

out that." I have never been happier about being right on something in my life.

[The prepared statement of Mr. Gunther follows:]

PREPARED STATEMENT OF GERALD GUNTHER

I am personally overjoyed and proud as well as professionally heartened that this committee is considering the confirmation of Ruth Bader Ginsburg for a seat on the Supreme Court.

I speak as a teacher of constitutional law for more than thirty-five years, and as someone who has known Ruth Ginsburg well for almost as long a time. I am confident that she possesses all of the qualities you should cherish in a Justice.

Ruth Ginsburg was my student at Columbia Law School. She was a brilliant student; she demonstrated extraordinary intellectual capacities, as she has in everything she has undertaken throughout her life. In the 1950's, I set up Columbia's program for placing graduates as judicial law clerks, and I assisted her selection by a fine federal trial judge. I have followed her work closely in the years since; I admired her scholarly capacity as a faculty member at Rutgers and then at Columbia, and especially her work on behalf of women's rights, as a brief-writer and oral advocate before the Supreme Court.

As a teacher of constitutional law and the author of a casebook in my field, I am very familiar with her central, indeed historic, role in shaping the modern law of gender discrimination. To this day, I—and, I suspect, most teachers in my field—speak admiringly of her singular contribution.

In 1980, Ruth Ginsburg was named to the U.S. Court of Appeals for the District of Columbia Circuit. I was asked to speak at her investiture ceremony. I had just begun work on a biography of one of our greatest federal judges, Learned Hand (a biography that will be published in a few months). In my address before the D.C. Circuit, I understandably spoke about Hand and compared Ruth Ginsburg's potential talents with those of my subject. (I am taking the liberty of attaching my 1980 address as an appendix to this statement.) Although I do not claim a great track record in predictions, I have taken special delight in the fact that my expectations about Ruth Ginsburg were fulfilled. I said then that I knew Ruth to be "modest, thoughtful, penetrating, fair and open-minded," and I suggested that these qualities equipped her ideally for the bench. I also said that "she has the character and temperament, the persistence, \* \* \* the sense of responsibility, the modesty as well as the courage and strength reflected in Learned Hand's words and deeds." Hand's greatness, in my view, stems from a special combination of character and temperament and intellect that, in combination, produces the capacity to be a "modest but creative judge" who "is heedful of limitations stemming from the judge's own competence and [from] the presuppositions of our constitutional system." I read her opinions on the Court of Appeals for the last thirteen years with great interest as they were handed down, and she disclosed precisely those qualities.

In my close attention to Ruth's career over the years, especially her judicial career, some of Hand's words often come to mind as aptly describing Ruth Bader Ginsburg. Hand once said that the prime condition of great judging is a "capacity for detachment." He went on to say: "There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passionate foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias." A great judge, he also said, acts "with patience, courage, insight, self-effacement, understanding, imagination and learning."

Ruth Bader Ginsburg, I am convinced, possesses the ingredients, the "moral" qualities, Hand thought essential for greatness. I am confident that she will confirm that greatness on the Supreme Court. She clearly possesses the requisite intellect, temperament, and character. Her opinions reflect an obvious belief in and fidelity to the law, careful attention to the records before her, and an appropriate respect for the force of precedent. She has demonstrated integrity and analytical skills. She is also characteristically sympathetic to the fact that the disputes before her involve human beings and that a court's rulings have an impact upon those human beings. One would expect no less in a person who is herself a splendid human being, who has managed to integrate with great skill her roles as lawyer and teacher and judge as well as wife and mother, and who overcame the many obstacles that confronted women when she entered the profession.